2006

Brent Poll v. Board of Adjustments for the City of South Weber : Reply Brief

Utah Court of Appeals

Christopher F. Allred; Attorney at Law.
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Case No. 20061012-CA
IN THE UTAH COURT OF APPEALS

BRENT POLL, Petitioner and Appellant vs. BOARD OF ADJUSTMENTS for the City of South Weber, Respondent and Appellee	DISTRICT COURT CASE NUMBERS: # 050700359 and # 050700250 (Consolidated into # 050700250)

ON APPEAL FROM THE SECOND DISTRICT COURT, DAVIS COUNTY

The Honorable Jon M. Memmott, Second District Court Judge

REPLY OF THE APPELLANT

Appeal of case dismissals for lack of jurisdiction

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CITY ORDINANCES

JURISDICTION

Concur with Respondent.

ISSUES ON APPEAL AND STANDARD OF REVIEW

Disagree with Respondent about issues on appeal.

I. Jurisdiction being raised for the 'first time' in district court is not at issue. Poll agrees with the right to challenge jurisdiction at anytime.

Poll however questioned:

> Whether the Board of Adjustments in South Weber had the authority, as legislated to if by the City Council, to challenge its jurisdiction or if it was mandated by Utah Code Ann.§ 10-9a-706(1) to apply "each appeal and variance, request as provided in local ordinance."
>
> Poll also challenged whether the Respondent's had ever "subsequently determined that it lacked the authority" to hear and decide either of the first two appeals. The Board decided this on a third appeal (case #050603791), but no reference was ever made by the Board, on the record, that its decisions on the third also related to the first two.

II. The Respondent inaccurately defines the scope of this appeal.

The question of law before the Court of Appeals is whether the City Council in South Weber exceeded its authority in granting its Board of Adjustments broad authority [per U.S.C. Ann..§ 10-9a-701(3)(4)] when it legislated City ordinance 10-4-4(A).

The Respondent's specific question about limiting this scope to "affirmative" actions may be part of the Court's deliberations, but it does not define the above question. As the district court noted (transcript pages 48 - lines 22-25, page 49 - lines 1-15), there is no question that the City "through ordinance" intended its Board to hear the appeals at issue; and this included the "ability to conduct enforcement proceedings."

The propriety of this clear intent by the City is the primary question of law which generated this appeal.

III. As with (II) above, whether the legislature meant to restrict Cities from granting their appeal authorities the responsibility to enforce their land-use ordinances [as suggested they could in Utah Code Ann.§ 10-9a-701(4)(c)] may be a consideration on appeal, but there is no question that South Weber City meant its Board to have such jurisdiction.

IV. Questions regarding the merits of "individual issues" raised by Poll are improperly

before this Court.

The record is incomplete on such matters. The question of jurisdiction was raised to preclude an "extensive record hearing" (Transcript page 8 - lines 11-15). For example, there was no transcript made of the Board's recorded hearings as required by Utah Code Ann.§ 10-9a-801(7)(b).

Concur with standards of review as cited by Respondent..

ISSUES PRESERVED IN TRIAL COURT

Concur with Respondent about this regarding the issue of jurisdiction. Disagree with this regarding the issues of individual appeals as stated above as such records were incomplete at the district court level.

STATEMENT OF THE CASE

Concur with the Respondent's Statement of the Case as a general history at the district court level.

STATEMENT OF RELEVANT FACTS

1. Disagree.

There were three, not two appeals, at issue. Those were cases #050700250, 050700359,

and 050603791. This last case was consolidated with the first two 5 Dec 05 (R. page 331).

2 & 3. Disagree.

The issues, as cited by the Respondent, in those complaints are inaccurate for the reasons stated in item (I) above.

The record of the 'individual issues' is incomplete for the reasons cited in item (IV) above.

4. Concur.

5. Concur.

6. Concur.

7. Concur.

Disagree, however, with number of cases as reflected above. All three cases were consolidated into Case #050700250.

8. Disagree.

The Board never made this 'subsequent determination' as a political entity. The district court stressed this and questioned why it, rather than the Board, was being asked by the Respondent's attorney to rule formally on jurisdiction when the Board had failed to do so itself (T. pages 3-9).

9. Concur.

SUMMARY OF THE ARGUMENTS

Disagree with Respondent's premise.

As the "final arbiter" under Utah Code Ann.§ 10-9a-701(3)(i)(ii), the City's Board of Adjustment is the most immediate, informal, and economical means for Poll, or any citizen of South Weber, to have land-use appeals addressed in a quasi-judicial manner in accord with City Ordinance 10-4-4(A) and 10-4-5. Contrary to the Respondent's conclusion, the City legislated to give all citizens of South Weber the appeal rights and remedies cited in those ordinances. This had been reviewed regularly and considered lawful for decades as argued in the Appellant's brief.

Issue I. Concur.

Jurisdiction can be raised at anytime. Also, concur that it "makes no sense for a district

court to review the merits of a case over which the Board did not have jurisdiction in the first place."

Disagree with this concept, as practiced here, where the respondent asked for dismissal based on jurisdiction before the record is complete, then argues the merits of the individual issues as a part of its presentation over jurisdiction.

Issue II. Disagree.

The Respondent's definition of a 'decision' is much more narrow than one would expect of an appeal authority which is to act as the 'final arbiter' regarding land-use issues as described in Utah Code Ann.§ 10-9a-701(3)(a)(ii).

This definition is more narrow than the district court opined (T. page 13, line 23-25, pages 14, 15). An informal decision not to act is still a decision.

This definition is more narrow than the City Ordinance 10-4-4(A) and 10-4-5 which included enforcement proceedings. Such proceedings are always about failures to act at all or act in accord with City land-use ordinances.

Issue III - Disagree.

The proper remedy would be for the Mayor to enforce City ordinances exactly as written

and so required by State law and other City Ordinances. The first option to this would be for the Board to apply City Ordinance 10-4-5 so the land-use ordinances are still enforced. All other remedies bypass the concept that the City will create a final arbiter over land-use issues.

Contrary to the Respondent's claim, the Board **does** have the authority City Ordinance 10-4-5 to order the enforcement of City ordinances.

ARGUMENT

I. Jurisdiction - Concur.

Respondent misunderstands Poll's conclusion. Poll agrees that jurisdiction can be challenged at anytime, so he concurs with this basic argument as a question of law.

As a question of fact, Poll agrees with the District court which found (T. pages 3-9) that the Board had not formally or informally decided that it did not have jurisdiction to hear and decide Cases 050700359 and 050700250. In fact, the record shows it decided that it had such authority to act and so acted on both cases.

The Respondent's example of a "search and seizure" situation is unfounded and inappropriate. The Board's authority under City ordinances and State laws is limited to land-use issues only; but there the Board is to serve as the City's final arbiter.

II. Disagree with the "affirmative" order premise.

Neither the word 'affirmative' nor any close synonym for it can be found in any part of Utah Code Ann.§ 10-9a-701, 10-9a-703, 10-9a-705, 10-9a-706 or 10-9a-708. This narrow and restrictive term contradicts the general phrase of serving "as the final arbiter" of issues involving the interpretation or application of land-use ordinances" as mandated in Utah Code Ann.§ 10-9a-701(a)(ii).

A. Concur.

B. Disagree.

As with II above, there is nothing in the referenced State code that limits the authority of the Appeal Authorities beyond the common language of the code. Serving as **the final arbiter of issues involving the interpretation or application of land-use ordinances** (emphasis added) as shown in Utah Code Ann.§ 10-9a-701(a)(ii) is a very broad authority within a narrow field of City administration. Being **the** final arbiter indicates that there is no higher authority within the City (emphasis added).

When combined with Utah Code Ann.§ 10-9a-701(4)(c), which allows the City to empower its appeal authority to hear and decide "every theory of relief that it can raise in district court," (as reflected in South Weber City Ordinance 10-4-4a); then the Board has

no definitive limits beyond those expressly defined in the Code. Such express limitations are found only in Utah Code Ann.§ 10-9a-305, 10-9a-514, 10-9a-516, and 10-9a-520. They do not impact the matters at issue here.

The Respondent also errs (page 9 - middle para) in stating that City Ordinance 10-4-4 "limits" appeals to "specific" order, requirement, decision or determinations," etc.

The words "specific" and "limited" are not in City Ordinance 10-4-4(A). Also, the modifier/adjective is not "a" order, requirement etc., but "any" order, requirement, etc., is correct. The accurate references are not limiting while those incorrectly injected by the Respondent are limiting.

The Respondent's concept of what may be "ripe" on an order or a formal decision seems reasonable on the surface, but if the State Legislature meant to limit this just to such formal decisions and orders, then it would have not added interpretations and requirements to this Code. A synonym for a 'requirement' in Webster's Collegiate Dictionary is a 'necessity.' The difference (if any) between a 'necessity' and a mandate, as applicable to City ordinances, is negligible.

The word "shall" is always mandatory in accord with City Ordinance 10-1-10. Therefore, in plain language any error or failure to enforce a necessary/mandated City

Ordinance is subject to appeal under City Ordinance 10-4-4(A). Utah Code Ann.§ 10-9a-706(a) also requires/mandates that "each appeal authority shall conduct each appeal and variance in accord with local ordinance."

This State law compels the Board to apply City Ordinance 10-4-4(A) as written and construed in plain language. It provides no prerogative to "conduct each appeal" through added restrictive language such as 'limits' or 'specific.' It does not allow for changes in broad modifiers such as 'any' to narrow ones as the word 'a'.

C. Disagree.

Disagree for the same reasons cited in (B) above. The Board does not have the discretion to replace the broad language of State law and City ordinances with its own narrow language.

The Respondent's application is taken out of context as it applies to Toone vs. Weber County, 57 P.3d 1079, 1082 (Utah 2002). The Court there was evaluating definitive/ formal decisions for the purpose of deciding the proper tolling of time to file complaints under statutes of limitations. It concluded there was a finite time frame for definitive/ formal decisions, but less clarity when there was a complaint without a definitive/formal date/time of a decision. The Respondent cannot make a logical nexus between the merits

of that case and a quantum leap to this and conclude that only such 'formal' decisions can be the basis of any land-use appeal.

Whether a party must first exhaust administrative remedies as the Respondent cites on page 11, is also not at issue on this case. The Respondent misstates the plain language of Utah Code Ann.§ 10-9a-802. This section does not provide a required procedure ("on-the-other-hand") which "someone" that is "alleging an ordinance violation" must pursue rather than the appeal procedures in section 10-9a-801. Section 10-9a-802(1)(a) allows:

> the "municipality or any adversely **affected owner of real estate** within the municipality in which violations of this chapter or ordinances enacted under the authority of this chapter occur or are about to occur **may, in addition to other** remedies provided by law, institute:
>
> (i) injunctions, mandamus, abatement or any other appropriate actions or
> (ii) proceedings to prevent enjoin, abate, or remove the unlawful building, use, or act."

This ordinance is a voluntary (may) **additional** avenue of potential relief for both the **real estate owner** and the municipality. It cannot be read realistically as the Respondent claims as a mandatory (shall) avenue through which all those adversely affected by a Mayor's failure to force City ordinances are limited to pursue. Moreover, one is not required to be a **real estate owner** to appeal under section 10-9a-801 but is so required in section 10-9a-802 (emphasis added).

The State Legislature could not have intended to exclude all citizens, who do not own

real estate, from due process and basic appeal rights regarding a municipality's failures to enforce its land-use ordinances. The Respondent's argument, in this instance, advocates such exclusion. Also, if the Legislature meant Utah Code Ann.§ 10-9a-802 to mandate pursuit of enforcement failures through this provision, it would have required it with 'shall' rather than 'may,' and made it the only avenue of pursuit rather than an "additional" one.

III. The Board does not have the authority to order the enforcement of ordinances. Disagree.

City Ordinances 10-4-4(A) and 10-4-5 provide the Board with this authority and responsibility. The district court acknowledged this (T. pages 49, lines 23-25, page 49, lines 1-15). The City had so empowered its Board "through ordinance" and this clearly included "the ability to conduct enforcement proceedings."

The district court further opined that this was beyond the scope of what the State Legislature intended. This is the question at issue before the Utah Court of Appeals.

The Respondent's arguments about what is "generally" (page 13 - middle para) appropriate for Boards of Adjustment is not founded in fact or relevant to the amount and degree of responsibility legislated to the Board by the City of South Weber. There is

nothing factual in the record to show viable statistics about what is "general" or normal for appeal authorities throughout this State.

If such were accumulated, it still would have no relevance here. The only germane question remains: Did the City Council exceed the authority authorized to it by the State when it legislated City Ordinance 10-4-4(A) and 10-4-5?

There is no question that the plain language of those ordinances provided the Board with the exact powers and responsibilities which the Respondent is now arguing that it "does not have." This rather than simply applying those ordinances exactly as written in accord with Utah Code Ann..§ 10-9a-706(1).

The Respondent's arguments about what should or could have been, or what Black's Law Dictionary (page 14) says is "extraordinary" also have no relevance here. The only question at issue for the Court of Appeals remains as stated previously.

Did the City exceed the authorization from the State when it legislated City Ordinance 10-4-4(A) and 10-4-5?

IV. NONE OF THE INDIVIDUAL ISSUES RAISED BY POLL .....

Disagree.

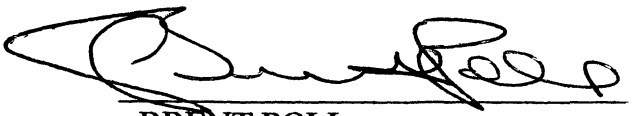
The merits of the individual issues are not matters properly before this Court. The record is incomplete on such matters. The Respondent brought its Motion to Dismiss largely to preclude it from the responsibility of preparing a transcript of the Board's hearings as required by Utah Code Ann.§ 10-9a-801(7)(b). The Respondent and the Court discussed this at length, and concluded that the intent was to "avoid" an extensive record hearing (T. pages 3-9 with emphasis on page 8, lines 8-15).

There are many errors of fact (reflected on pages 15-22 of the Respondent's brief) voiced by both the district court and the Respondent, which could be readily resolved in the Appellant's favor, if the record on the "individual issues" were complete. However, it is not complete so it is inappropriate for either party to argue the merits of the substance of those issues to the Utah Court of Appeals.

CONCLUSION

Based on the above, the Appellant respectfully asks the Court to review the briefs (including the Respondent's new argument that shows citizens who do not own real estate are without due process regarding enforcement), and then reverse the district court's order which dismissed Poll's petitions for lack of jurisdiction.

dated 2 Jul 07



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This is to certify that two copies of the attached document were mailed to the address shown below on 2 July 2007.

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